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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 487

LEVER BROTHERS COMPANY,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

**On Appeal from the United States District Court for the Southern District of Ohio, Western Division**

## MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, THE PROCTER & GAMBLE COMPANY, ET AL.

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IN THE

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OCTOBER TERM, 1962

No. ———

LEVER BROTHERS COMPANY,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

**On Appeal from the United States District Court for the Southern District of Ohio, Western Division**

## MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, THE PROCTER & GAMBLE COMPANY, ET AL.

The Appellee, The Procter & Gamble Company, (herein referred to as "Procter") a party to the discovery proceedings from which this appeal is sought to be taken respectfully moves pursuant to Rule 16 of this Court, to dismiss the instant appeal, on the ground that it is not within the jurisdiction of this Court because this appeal is not authorized by the Expediting Act, 15 U.S.C. § 29, and, therefore, not in conformity to statute; or, in the alternative, to affirm the rulings below on the ground that it is manifest that the

questions on which the decision of the cause depend are so unsubstantial as not to need further argument. The individuals R. S. Runnels, A. N. Halverstadt and J. W. Hanley, to whom the discovery process was directed, join The Procter & Gamble Company in these Motions.

## OPINION BELOW

The opinion and orders below are set forth in Appellant's brief and for the convenience of the Court they are also included in the Appendix herein at pages 1a-4a.

## STATUTES AND RULES INVOLVED

The Expediting Act, 15 U. S. C. § 29; Section 7 of the Clayton Act, 15 U. S. C. § 18, and the applicable sections of Rules 30 and 45 of the Federal Rules of Civil Procedure are set out in the Appendix at pages 5a-7a.

## PRELIMINARY STATEMENT

This is an attempted appeal by Lever Brothers Company (herein referred to as "Lever") from two discovery orders entered by the District Court for the Southern District of Ohio. Procter and the individual deponents are not parties in the principal action which is pending in the District Court for the Southern District of New York. The trial of this action has not yet commenced.

The United States instituted that action under the anti-trust laws in the District Court for the Southern District of New York against Lever and Monsanto Chemical Company, alleging that Lever's acquisition of the property rights in a synthetic detergent product "All" from Monsanto violated Section 7 of the Clayton Act, 15 U. S. C. 18.

On May 1, 1962, Lever served notice of the taking of the depositions of three of Procter's employees, the individuals named above. On the same date, Lever obtained sub-

poenas from the Clerk of the United States District Court for the Southern District of Ohio, Western Division, the district in which they resided, to compel their attendance as witnesses. One of the subpoenas was a subpoena duces tecum directing the employee, R. S. Rennels, to bring certain records of his employer, The Procter & Gamble Company, with him to the deposition proceeding.

The Procter & Gamble Company and the individual deponents filed in the District Court for the Southern District of Ohio, Western Division, the Court from which the subpoenas issued, motions to quash the subpoena duces tecum under Rule 45 of the Federal Rules of Civil Procedure and to limit the scope of deposition examination under Rule 30 of the Federal Rules of Civil Procedure. By these motions it was asserted that Procter should be protected from disclosing valuable and confidential trade secrets to Lever, a competitor.

After considering extensive affidavits and memoranda filed by both Procter and Lever, on July 13, 1962, the District Court in Ohio granted the motion to quash the subpoena duces tecum and overruled the motion to limit the scope of the deposition examination. Thereafter, Lever commenced oral examination of the deponents and sought to elicit substantially the same information which was contained in the documents called for in the quashed subpoena duces tecum. On advice of counsel, the deponents refused to answer and Lever sought an order from the District Court for the Southern District of Ohio, Western Division, to compel the deponents to answer the questions propounded by Lever. On July 24, 1962, the District Court denied this motion.

Lever filed a notice of appeal on August 6, 1962 to this Court, and on August 10, 1962 Lever filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit.

## QUESTION PRESENTED

There is but one question presented by this appeal: Did the District Court from which the subpoenas issued abuse the discretion lodged in that Court under Rules 30 and 45 of the Federal Rules of Civil Procedure by granting the motion of The Procter & Gamble Company et al. to quash the subpoena duces tecum calling for discovery in an action pending and not yet tried in another district of valuable and confidential trade secrets of a financial nature and by limiting the scope of deposition examination of the subpoenaed discovery witnesses so as not to disclose that data to a competitor?

## ARGUMENT

### I. Appellate Jurisdiction Under the Expediting Act Is Limited to the Review of Final Judgments in Civil Antitrust Actions in Which the United States Is the Complaining Party. In the Present Case No Final Judgment Has Been Entered.

The very statement of the Questions Presented in this appeal invites a challenge of the jurisdiction of the Court to hear the appeal at this stage of the case below. The orders which Lever now asks this Court to review are clearly interlocutory. They are pretrial discovery orders in a case whose trial has not begun—no other type of order is likely to be more obviously interlocutory. This Court has consistently held that the words "final judgment" in the Expediting Act mean precisely what they say and that Congress thereby intended to preclude appeals from interlocutory orders either to this Court or to a court of appeals in the class of antitrust actions covered by the Expediting Act. This position was reiterated very recently in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962), wherein the opinion of the court stated at page 305:

"In a civil antitrust action in which the United States is the complainant that Act (15 U. S. C. § 29) provides for a direct appeal to this Court from the *final* judgment of the district court." (emphasis by the Court)"

---

"" Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree. *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 558."

Justice Harlan took the position that the appeal in the *Brown Shoe* case should have been dismissed for lack of finality because the terms of the divestiture decree had not been fixed by the district court. In his opinion, Justice Harlan noted that speedy disposition of civil antitrust action brought by the United States was a "major policy consideration" disclosed by the legislative history of the Expediting Act and that

". . . it was entirely consistent with its desire to expedite these cases for Congress to have eliminated the time-consuming delays occasioned by interlocutory appeals either to intermediate courts or to this Court." (370 U. S. at page 358)

If a direct appeal could be taken to this Court from interlocutory discovery orders of the type involved herein, the policy of the Expediting Act would be completely flouted. This Court would, in effect, be looking over the shoulder of every district court throughout the pretrial, trial, relief and judgment stages of all civil antitrust cases brought by the United States. Cases of this type which are notoriously "protracted" would become even more "protracted" should

an appeal of this type be now recognized. Clearly, Lever is seeking to circumvent both the plain meaning and policy of the Expediting Act by this application for piecemeal review.

In a case decided soon after the Expediting Act was passed, *Alexander* v. *United States*, 201 U. S. 117 (1906), this Court held that an order of a district court directing a third-party witness to produce documents and to testify before a special examiner in an antitrust action brought by the United States was not a final order and, consequently, not appealable to the Supreme Court.

There the antitrust action was brought in the Circuit Court for the District of Minnesota. The United States obtained an order from the Circuit Court for the District of Wisconsin for the issuance of a subpoena duces tecum to the witnesses to appear and testify on behalf of the United States within that district. When the witnesses appeared but refused to produce certain documentary evidence and to answer certain questions, the United States petitioned the Wisconsin Court for an order directing the witnesses to produce the documents and answer the questions. That Court granted the petition of the United States but allowed the witnesses to appeal to the Supreme Court.

Contemporaneously, the Minnesota Court entered an order directing other witnesses to appear and testify before an examiner on behalf of the United States in the same antitrust action. The Minnesota Court denied the witnesses' application to appeal for the reason that the order was interlocutory and lacked finality, and, upon the witnesses' further refusal to comply, punished them for contempt. An appeal from the contempt judgment was also taken to the Supreme Court. *Nelson* v. *United States*, 201 U. S. 92 (1906).

The *Alexander* and *Nelson* cases were consolidated for argument and it is significant that the appellants urged that

the newly enacted Expediting Act afforded a basis for jurisdiction. See Argument for Plaintiffs in Error, 201 U. S. at pages 106-107.

Since the petitioners in *Nelson* had been found guilty of contempt which was a final judgment, there was no question as to the jurisdiction of the Supreme Court in that case.

However, in *Alexander*, this Court dismissed the appeals for lack of jurisdiction. In so doing, this Court noted that prior to punishment of a witness for failure to comply with an order to testify ". . . the proceedings are interlocutory in the original suit" 201 U. S. at 122. The Court concluded by quoting with approval the opinion of the Minnesota Court in which leave to appeal had been denied, stating:

> "'I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the *parties* to the principal suit cannot appeal or obtain a writ of error from that decision.'" (Emphasis added) (201 U. S. at 122)

Hence, the question raised by Lever was decided by this Court adversely to Lever's contentions, over 50 years ago. The same principle was expanded in *Cobbledick* v. *United States*, 309 U. S. 323 (1940), and more recently in *Dibella* v. *United States*, 369 U. S. 121 (1962). Although the latter case dealt specifically with the appealability of an interlocutory order in federal criminal procedure, Justice Frankfurter used the occasion to review the traditional necessity of finality as prerequisite to appellate review in both civil and criminal procedure. At the outset the Justice observed:

> "The general principle of federal appellate jurisdiction derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." (369 U. S. at 124)

Should the proceedings in the District Court in the Southern District of Ohio be considered a separable action, then jurisdiction of the Supreme Court in this appeal is lacking on two additional grounds. First, the complainant in Ohio was not the United States, and second, the rulings appealed from were not made by the district court in which the antitrust action was brought. Both of the conditions must prevail or the requirements of the Expediting Act are not met.

The Expediting Act confers appellate jurisdiction on this Court only to review final judgments "of *the* district court" which can only refer to a final judgment of the district court *in which the antitrust action is brought by the United States as complainant.* In this case, that district court is, of course, the Southern District of New York, not the Southern District of Ohio.

When a final judgment is reached in the principal action in the New York Court either dismissing the action or granting relief, the matter will be ripe for review and this Court will have exclusive jurisdiction under the Expediting Act. All preliminary matters will be merged in the final judgment and will be subject to review by this Court.

The review of the discovery rulings herein involved may take place in either of two ways:

First, if Appellant, Lever, wishes to offer the testimony of Procter as its witness at the trial, Lever has the processes of the trial court available to it. It is not until the New York Court adheres to the ruling of the District Court in Ohio and Lever loses the principal action that Lever may be said to have been prejudiced. This claimed error may then be assigned in its appeal.

Second, we believe that the rulings of the Ohio District Court would be merged in the final judgment in the New York case and, therefore, receivable on an appeal from that judgment. See *Parr* v. *United States*, 351 U. S. 513, 518-519 (1956).

It is respectfully submitted that the Expediting Act, relied upon by Lever, does not afford a basis of jurisdiction now to review the orders in question and the appeal should, therefore, be dismissed.

The wisdom of confining appellate jurisdiction to final orders is well demonstrated by this very case.

Lever has asserted that it needs information from Procter to establish certain conclusions set out in ¶5 of its "Tentative Statement of Issues" filed in the New York case and also filed as part of the record in this proceeding. (Item 14(e) as listed in Stipulation as to Record.) Without conceding the validity of these conclusions, it is apparent that the conclusions are quite general in nature. As the affidavit of Samuel Benedict (Item #19 as listed in Stipulation as to Record) shows, Procter has submitted a great volume of information to both Lever and The United States, much of which related to Lever's contentions expressed in its "Tentative Statement of Issues."* In addition, Procter offered to supply additional information bearing upon the issues in the New York case. At the deposition of R. S. Runnels, Procter counsel volunteered as follows:

> ". . . This blanket instruction [not to answer certain specific questions] will not cover general information which the witness has concerning Procter & Gamble, its products and its place in the industry, apart from the information contained in the books and records listed on Schedule A of that subpoena.

* The Court below was impressed with the vast amount of information previously produced by Procter under discovery procedures in the principal action to the parties in that action, the United States of America and Lever. The Court in its opinion stated:

> ". . . This conclusion is based on the failure of the defendant to show good cause to require production of the detailed information sought. Much information in the general area of that contemplated by the subpoena has already been made available to the defendant by the use of cross interrogatories and through motion requiring the United States to produce information."

"We do not know how far counsel for Lever wish to go in the area outside of the Schedule A material. That is for them to decide." (Page 14 Deposition of R. S. Runnels; Item 24 as listed in Stipulation as to Record.)

Thereafter, Lever counsel confined their questions to the witness to the record information which had previously been denied to them by the District Court. Lever adjourned the deposition over the protest of counsel for the Justice Department, representing the Plaintiff, United States of America, in the principal action. At that point in the deposition, Procter counsel again reminded Lever that the Procter officials, particularly Mr. Halverstadt and Mr. Hanley, have information "concerning the competition of Procter & Gamble in these products and their place in the industry, all of which may have a bearing upon the issues in this case." (pp. 29-30 Deposition of R. S. Runnels Item 24 as listed in Stipulation as to Record.) Lever was also reminded of the availability of these other witnesses, but Lever persisted in their adjournment of the deposition, (Deposition of R. S. Runnels, pp. 29-32) and thus Lever refused to call the other witnesses and refused to consider whether or not their testimony would be sufficient for Lever's purposes.

Thus, Lever has not exhausted this source of discovery, and has not even begun to explore other sources of proof for its asserted conclusions. Clearly Lever should not be permitted to subject a non-party witness to the time and trouble of an appeal where Lever has not even attempted to obtain equivalent information from accessible sources.

The statement of the Questions Presented in the Jurisdictional Statement of the Appellant, Lever, invites certain inferences, perhaps unintended. These warrant only brief response.

(1) The assignment of the principal action "for all purposes" to Archie O. Dawson, J., by the Chief Judge of District Court for the Southern District of New York was the designation of Judge Dawson to handle

all matters for *that* Court.* The assignment is vis-a-vis other judges of the same District and has no effect outside the District in which the case is pending. The Rules of Civil Procedure give the court issuing the subpoena jurisdiction to quash it, and give the court in which the deposition is being taken (or the court in which the action is pending) the jurisdiction to limit the scope of a deposition. See Infra pp. 5a-7a. The Chief Judge's assignment order could not void the jurisdiction given by the Rules themselves.

(2) Procter, Appellee, is not aware of any instance in which Judge Dawson "required" the evidence in question or "concurred" in the discovery efforts of Appellant, Lever, against Procter *for the specific records* covered by the rulings of the Court below.

The statement of Judge Dawson quoted on p. 8 of the Jurisdictional Statement is not a part of the record in this Court:**

---

* The situation in the District Court of New York, where there are twenty District Judges, was specifically discussed in the Seminar on Protracted Cases for United States Judges at Stanford, California in 1958 (23 F.R.D. 587 at 589).

** If the Court has interest in the quoted statement even though it is not a part of the record in the case, the Court will also be interested in the following excerpts from a pretrial conference held by Judge Dawson in New York on September 19, 1962:

* * *

"THE COURT: What is the data that you want from Procter & Gamble? (Tr. p. 5).

"THE COURT: Why do you have to prove that? Can't you prove that trademarks in the detergent field become valuable as a result of advertising?

"You can get advertising executives to testify probably. I don't see why you need figures if Procter & Gamble think they are confidential." (Tr. p. 6).

"THE COURT: I do not know why the advertising figures or research figures of a particular company, such as Procter & Gamble, are particularly necessary. It seems to me you can establish the fact that what advertising had to be done, you can get a New York advertising agency to testify as to the effect of advertising." (Tr. pp. 7-8).

"THE COURT: I take it that you can get evidence as to the tremendous power in the market and the tremendous amount of expenditures they made without getting their precise figures." (Tr. p. 10).

"THE COURT: What difference does it make in the case what their profits were?

"Suppose you established that they were making tremendous profits without getting the figures, what about that?" (Tr. p. 11).

"THE COURT: I can understand Procter & Gamble is a little suspicious when its competitor comes along and says: 'For this anti-trust case we want to get this confidential information.'" (Tr. p. 27).

**Procter is not a party to the action in New York and was not present at the above pretrial conference.**

**We do not presume to say that Judge Dawson is now in agreement with the Procter position on this confidential data. We hope he will be if the question is presented to him. We cite these transcript references simply to refute the Lever claim that the New York Court "concurred" or "agreed" with the Lever discovery efforts against Procter for these particular figures.**

Furthermore, even the statement on p. 8 does not purport to cover the type of records involved in the Court below, i. e., data on an individual brand basis. Judge Dawson would hardly be expected to disregard the distinction drawn by his predecessor, Judge Irving R. Kaufman, in the principal action between data on a brand basis and other data. In a prior proceeding before Judge Kaufman involving non-brand records of Procter, Judge Kaufman was influenced to order their disclosure to Lever because they were *not* on an individual brand basis:

> "... In addition, the sales, production, and profit figures do not contain breakdowns by brand names, the type of data which presumably would be most injurious if improperly used by a competitor." *United States* v. *Lever Brothers Company*, 193 F. Supp. 257.

The conclusion is inevitable that the acceptance of this appeal would frustrate the clear purpose of Congress, expressed in the Expediting Act, and would weaken the trial court's ability to handle protracted cases.

The appeal is not in conformity to statute.

## II. The Questions Presented Are Not Substantial.

Lever's assertion that this attempted appeal raises substantial questions of judicial administration is divorced from the reality of this particular case.

The matter is of so little consequence in the principal action that Appellant, Lever, has not seen fit to request a stay of the proceedings in the principal action pending the outcome of this appeal. No application for a stay has been made to this Court, and the record in this case does not disclose an application for a stay to the trial court.

Lever has not been prejudiced in the principal action. Lever has not yet lost the case. In fact the trial has not begun although the case has been pending for over four years. The relevance and admissibility of the evidence in question has not been passed upon by the trial court.

The availability of other processes in the trial court and the provision for direct appeal to this Court from the final judgment makes the case for appealability of an interlocutory order even less impressive in this case than in the usual case.

IN THE ALTERNATIVE, THE MOTION TO AFFIRM SHOULD BE GRANTED.

The order of the District Court granting Procter's motion to quash the subpoena duces tecum directed to R. S. Runnels was clearly not due to any misconceptions as to the grounds for quashing a subpoena duces tecum. In support of its motion, Procter established by affidavits (Items 9 and 18 as listed in Stipulation as to Record) of its officials, that the information called for by the subpoena was highly confidential and that disclosure to Lever, a major competitor both in this country and overseas, would be extremely prejudicial.* Lever denied these conclusions but opposed an oral hearing of the witnesses on this issue. (Item 15 as listed in Stipulation as to Record.) Procter showed the District Court the large amount of information

* Lever states at pages 6 and 15 of the Jurisdictional Statement that the United States recognized the necessity of much of the same data sought by Lever but "failed" to obtain it from Procter. The United States did not try and fail. The United States withdrew its request for brand advertising and promotion expenditures as part of a stipulation approved by the New York court. (Item 10, exhibit 3 as listed in Stipulation as to Record). The United States has consistently taken the position that the information sought by Lever is not necessary to a determination of the issue of the legal effect of Lever's acquisition of "All" from Monsanto. (Letter Loevinger to Judge Peck—Item 11 as listed in Stipulation as to Record).

and records previously submitted to Lever and the United States in the discovery processes of the principal action. (Item 19 as listed in Stipulation as to Record.)

In view of this state of the record, the only fair interpretation of the basis for the District Court's order is that Lever failed to come forward with sufficient evidence showing the necessity of the information demanded from Procter to overcome Procter's showing of confidentiality and prejudice likely to result from disclosure. The same standard has been applied in other cases. See *Hartley Pen Co.* v. *United States District Court*, 287 F. 2d 324 (9 Cir. 1961); *Application of Consumers Union*, 27 F. R. D. 251 (S. D. N. Y. 1961); *United States* v. *Serta Associates, Inc.*, C. C. H. Trade Cases ¶ 70,310 (N. D. Ill. 1961).

The determination of the District Court that the subpoena duces tecum should be quashed and that the same matter not be disclosed by oral deposition was an exercise of the discretion afforded to the District Court by Rule 30 (d) and 45 (b) and (d) of the Federal Rules of Civil Procedure. Manifestly, this discretion has not been abused and, therefore, the decision of the District Court should be affirmed. *Grant* v. *Phoenix Life Ins. Co.*, 121 U. S. 105, 115-116 (1887); *In re Manufacturers Trading Corp.*, 194 F. 2d 948, 953-954 (6 Cir. 1952); cf. *Garland* v. *Torre*, 259 F. 2d 545, 550-551 (2 Cir. 1958) Cert. denied 358 U. S. 910.

## CONCLUSION

Since the orders complained of relate only to discovery in a presently pending case, jurisdiction under Section 2 of the Expediting Act is clearly lacking at this time. In the alternative, the orders should be affirmed as being manifestly within the legitimate area of discretion afforded to the District Court by the Federal Rules of Civil Procedure to control pretrial proceedings.

Respectfully submitted,

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November 1, 1962

# APPENDIX

## Opinion of the District Court for the Southern District of Ohio, Western Division

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI 2

JOHN W. PECK
*Judge*

July 3, 1962

DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
Union Central Building,
Cincinnati 2, Ohio

Re: Civil Action No. 5054

UNITED STATES OF AMERICA
v.
LEVER BROS. CO., ET AL.

Gentlemen:

After a review of the transcript of the arguments of counsel relative to the motion of certain parties named in a subpoena duces tecum in the above action to quash said subpoena, and of the voluminous affidavits and memoranda submitted in connection therewith, it has been concluded that the motion is well taken.

This conclusion is based on the failure of the defendant to show good cause to require production of the detailed information sought. Much information in the general area of that contemplated by the subpoena has already been made available to the defendant by the use of cross interrogatories and through motion requiring the United States

to produce information. In resisting the motion, defendant relies strongly on the learned opinion in *United States v. Lever Bros.*, 193 F. Supp. 254 (S. D. N. Y. 1961), but in contrast to the situation here existing it will be noted that that decision was concerned with figures which did not "contain breakdowns by brand names, the type of data which presumably would be most injurious if improperly used by a competitor."

An entry sustaining the motion to quash subpoena duces tecum and overruling the motion to limit scope of deposition examination for the reason indicated at the time of the oral argument (Transcript, p. 5), endorsed by counsel for the parties concerned, may be presented.

Yours truly,

JOHN W. PECK

cc: PAXTON & SEASONGOOD
MR. JAMES J. COYLE

---

**Order of the District Court for the Southern District of Ohio, Western Division, Dated July 13, 1962**

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 5054

In the Matter of:

UNITED STATES OF AMERICA, *Plaintiff*

v.

LEVER BROTHERS, ET AL., *Defendants*

ORDER

This cause came on to be heard on the motions of The Procter & Gamble Company, Richard S. Runnels, Albert

N. Halyerstadt and John W. Hanley to quash the subpoena duces tecum addressed to Richard S. Runnels and to limit the scope of deposition examination of Richard S. Runnels, Albert N. Halverstadt and John W. Hanley, pursuant to subpoenas heretofore issued to appear and testify on behalf of Lever Brothers. The Court, having heard argument of counsel and having considered the affidavits and memoranda submitted by the parties and being fully advised in the premises, finds that the motion to quash the subpoena duces tecum to Richard S. Runnels should be, and hereby is, sustained, and it is ordered that the said subpoena duces tecum be quashed. The Court further finds that the motion to limit the scope of deposition examination is premature, said depositions not having been commenced, and it is therefore ordered that the motion to limit the scope of deposition examination is overruled.

s JOHN W. PECK (J)
*United States District Judge*

DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
s RICHARD BARRETT
*Attorneys for The Procter & Gamble Company.*
R. S. Runnels, A. N. Halverstadt and
J. W. Hanley.

No objection as to form

s PAXTON & SEASONGOOD
*Attorneys for Lever Brothers*

Dated: July 13, 1962.

## Order of the District Court for the Southern District of Ohio, Western Division, Dated July 24, 1962

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 5054

In the Matter of:

UNITED STATES OF AMERICA, *Plaintiff*

v.

LEVER BROTHERS, ET AL., *Defendants*

### Order

This cause came on to be heard on the motion of Lever Brothers Company for an order to compel Richard S. Runnels, Albert N. Halverstadt and John W. Hanley, witnesses subpoenaed to testify on behalf of Lever Brothers Company, to answer certain questions propounded on oral deposition examination which the witnesses declined to answer on the instruction of counsel. It appearing that the questions call for the same information as contained in the books and records of The Procter & Gamble Company identified in Schedule "A" to the subpoena duces tecum addressed to Runnels, which the Court ordered quashed in July 13, 1962,

It is Ordered that the motion should be, and hereby is, denied.

/s/ JOHN W. PECK (J)
*United States District Judge*

/s/ RICHARD BARRETT
DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
*Attorneys for The Procter & Gamble Company,*
R. S. Runnels, A. N. Halverstadt and
J. W. Hanley.

No objection as to form
/s/ ABE KRASH
*Attorneys for Lever Brothers Company*
Dated: July 24, 1962.

## STATUTES AND RULES INVOLVED

The Expediting Act, 15 U. S. C. § 29:

**§ 29. Appeals to Supreme Court**

In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. Feb. 11, 1903, c. 544, § 2, 32 Stat. 823; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, § 17, 62 Stat. 989.

Section 7 of the Clayton Act, 15 U. S. C. § 18:

**§ 18. Acquisition by one corporation of stock of another**

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

Rule 30, Federal Rules of Civil Procedure:

**Rule 30. Depositions Upon Oral Examination**

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(b) **Orders for the Protection of Parties and Deponents.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or

that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

* * * * *

**(d) Motion to Terminate or Limit Examination.** At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

Rule 45, Federal Rules of Civil Procedure:

**Rule 45. Subpoena**

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**(b) For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things. As amended Dec. 27, 1946, effective March 19, 1948.

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**(d) Subpoena for Taking Depositions; Place of Examination.**

(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the person named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.